IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

Suit No.1038 of 1981

M.J.Exports Pvt. Ltd. ..Plaintiff

V/s

1. National Agricultural Co Op
Marketing Fedration of
India Ltd.

2. Indian overseas Bank

3. Union Bank of Middle East Ltd.... Defendants

Mr.K.D.Shah for Plaintiff
Mr.Shashipal Shankar for Defendant no.1
Mr.R.C.Shah i/b Pandya Gandhi for Defendant no.2

CORAM:S.R.SATHE,J.

DAETD:28th November 2005

ORAL JUDGMENT :-

1. Plaintiff company has filed this suit against the defendants for a declaration that the 1st defendants are not entitled to enforce the guarantee dated 6-1-1981 till the matter referred to therein has been resolved or decided by the highest court or tribunal and for permanent injunction restraining 1st defendants by an order of injunction from enforcing the said guarantee or taking any steps for enforcing the said guarantee or otherwise recovering from the plaintiffs the sum of Rs.7,49,925/-.

2. Plaintiffs case in brief is that the plaintiff company is incorporated under the Companies Act, 1956 having its registered office at Bombay. The 1st defendants are Marketing Federation constituted by the Government of India (for the sake of convenience hereafter called NAFED) having its head office at New Delhi.

3. The plaintiffs used to export fresh onions to various foreign countries. Export of fresh onions was canalised through the Agency of NAFED under Export policy of Government of India. The packers ipso facto negotiate with the buyers overseas and whenever negotiations materialise, contracts for exports are entered into between packers and buyers overseas in the name of NAFED. The buyers thereafter open letters of credit in favour of NAFED and packers ship the goods and

procure bills of lading in the name of NAFED and ultimately negotiation of bills are made and realised by NAFED under such letters of credit. As per this policy, in or about March 1981 the plaintiffs entered into a contract with one Jawas Trading Establishment of Dubai for export of 400 tons of fresh onions at the price of Rs.1875/-per ton C and F Dubai. The said Jawas opened the letter of credit through their Bank, defendant no.3 for Rs.7,50,000/- in favour of NAFED. The plaintiffs shipped approximately 400 tons of fresh onions by ship called M.V. M.M.P.Wealth and M.V.Saheeda. The plaintiffs completed shipment as above, to procure bills of lading in the name and account of NAFED and submitted bills of lading and other shipping documents under cover of their local invoices to NAFED. In turn NAFED prepared their invoices on the buyers overseas and presented the documents for negotiation under the said letter of credit of Indian Overseas Bank, defendant no.2.

4. As per directions, defendant no.1 NAFED issued their invoice on the buyers overseas and presented documents for negotiations under letter of credit to Indian overseas bank, Mumbai, defendant no.2. The said bank after due scrutiny of documents realised payment as invoiced to the defendant no.1 without any reservation or any guarantee or indemnity. Indian Overseas bank in their turn forwarded the documents to Union Bank of

Middle East, Dubai which after some time purported to reject the same on the grounds of alleged discrepancies i.e. i) bills of lading did not indicate C and F ii) name of packer was mentioned M.J.Exports instead of M.J.Exports P.Ltd. iii) goods shipped by M.V.Saheeda were not in accordance with the contract as the bills of lading under which the shipment was made did not mention that the ship was not as Israeli ship or that the ship was not touching the Israeli part.

5. The 2nd defendants after releasing the money from the Union Bank of Middle East, Dubai made payment to the 1st defendants without any reservation. The Union Bank of Middle East did not make any reservation in the beginning but subsequently sought reservation and purported to justify non payment on the ground of certain discrepancies. According to the plaintiff, third defendant had no right to place any reservation on the said purported discrepancies as the same were of a minor nature.

6. On 6-1-1981 the plaintiffs executed letter of guarantee in favour of the defendant no.1 therein stating that they are contesting the validity of discrepancies as raised by defendant no.3 and that in consideration of defendant no.1 agreeing to contest the claim and contentions made by the issuing bank arising out of aforesaid discrepancies to the highest Court or

Tribunal in the country where such claim and contentions are agitated, the Plaintiffs will make the payment of sum of Rs.7,49,925-04 together with interest if any that may be awarded or decreed together with other incidentals that may be incurred purely in connection with contest of such claims and contentions. According to the plaintiff the defendant no.3 instead of recovering the amount from the said Jawas Trading Company asked the defendant no.2 to pay the said amount to them and the defendant no.2 also accordingly paid the said amount to the defendant no.3 and thereafter threatened the 1st defendant for recovering the said amount. First defendant therefore threatened the plaintiff to recover the said amount from them. Hence the above mentioned agreement was executed. When defendant no.1 started threatening the plaintiff for recovery of amount plaintiffs filed the present suit as the matter referred in the guarantee was not resolved or decided by the highest court as mentioned in the guarantee and prayed for declaration and injunction as mentioned above.

7. The first defendants filed their written statement and opposed the suit claim. They admitted that export of fresh onions was canalised through them and that plaintiff had never informed about the plaintiffs contract with one Jawas Trading Establishment of Dubai for export of 400 Tons fresh onions at the price of

Rs.1875/- per ton C and F Dubai and opening a letter of credit through 3rd defendant in favour of defendant no.1 for Rs.75,000/-. According to the defendants (no.1), 2nd defendant did not place any reservation in the beginning when they made payment to the defendant no.1 but they sought to do so subsequently. According to the defendant no.1 the defendant no.3 had no right to place any reservation on account of discrepancies alleged to be discovered by them. Even according to the defendant no.1, the said discrepancies were of minor nature and of no significance and as such they did not justify the rejection of the documents. However, the defendant no.1 further contended that if the Hon'ble Court holds otherwise the plaintiffs are bound to pay and that even to refund and repay the amounts received by them from defendant no.1 along with interest thereon.

8. The first defendants also contended that as stated in the guarantee deed executed by the plaintiff, the defendant no.1 contested the validity of discrepancies raised by 3rd defendant. The defendant no.1 therefore contended that the plaintiffs are now under an obligation to repay and refund to defendant no.1 amount of Rs.7,49,920-04 ps in case the defendant no.1 is held to be liable to pay the same. The defendant no.1 therefore contended that plaintiffs are not entitled to get declaration and injunction as prayed for.

9. During the pendency of the present suit plaintiffs took out Notice of Motion No.798 of 1981 and in the said Notice of Motion on 29-9-1991 following order was passed

> "Pending hearing and final disposal of the suit, the 1st defendants and their servants and agents are restrained from enforcing the agreement dated 6-1-1981 or recovering any amount thereunder provided that in case the defendant nos.2 or 3 recover or seek to recover any amount from the defendant no.1 by filing legal proceedings, the 1st defendant shall be at liberty to adopt suitable legal proceedings for enforcing the said guarantee and for recovering the amount from the plaintiffs".

10. After the said order, 2nd defendant i.e. Indian Overseas Bank filed a suit bearing suit NO.1153 of 1983 against defendants no.1 Union Bank of Middle East, Dubai and Bank of India in the High Court of Judicature at Bombay seeking decree in sum of Rs.12,23,458-40 with further interest. The defendant no.1 therefore informed the plaintiff about the suit filed by Indian Overseas Bank against them. The plaintiff gave reply to the said letter on 2-2-1984 giving undertaking and stating that total costs and expenses in the suit No.1153 of 1983 including the lawyer’s charges would-be borne by the plaintiffs and that the defendants would attend the

Court from time to time and fully cooperate in the said suit as and when necessary. The said suit however was transferred from High Court to Debt Recovery Tribunal where it was heard and decided on merits on 1-8-2003. By virtue of the order passed on that day the defendants were directed to pay Rs.12,23,458-40 to the plaintiffs therein (present defendant no.2). The defendant no.1 has also contended that thereafter they preferred an appeal against the said order dated 1-8-2003 and also prayed for waiver of 75% of the decreetal amount which was required to be deposited as a condition precedent for filing the appeal. The defendant no.1 therefore called upon the plaintiff to deposit the said amount. However, the plaintiff by letter dated 6-8-2004 alleged that the defendant no.1 has colluded with overseas Bank and the case was not fought properly and various documents were not taken on record. By that letter plaintiff also denied their liability of depositing 75% of the decreetal amount. Thus according to the defendant no.1 in view of the order dated 1-8-2003 they are entitled to enforce guarantee executed by the plaintiff on 6-1-1981 and the suit is liable to be dismissed.

11. On these pleadings the Court (Coram:D.K.Deshmukh J) has framed the following issues :

I have given my findings as mentioned against the same.

ISSUES

1. Whether the plaintiffs are entitled to declaration and permanent injunction prayed by them?	Yes,as per final order.
2. What reliefs?	As per final order.
3. And generally?	

12. In order to prove the claim of the plaintiff company the plaintiff has filed affidavit of witness S.S.Vasan, General Manager of the plaintiff company and produced certain documents. As against this defendant no.1 filed affidavit of its Assistant Manager R.M.Upadaya and produced certain documents. Both these witnesses have been cross examined by their opposite side advocate.

13. The defendant no.2 appeared but did not file any written statement. The defendant no.3 did not appear.

14. From the pleadings of the parties and their evidence it is very clear that there is no dispute that the plaintiffs informed the 1st defendant that they had entered into a contract with Jawas Trading Establishment of Dubai for export of 400 tones of fresh onions at the

price of Rs.1875/- per tone C and F Dubai and opened a letter of credit through 3rd defendant in favour of defendant no.1 for amount of Rs.7,50,000/-. Admittedly, bills of ladeing in that behalf in the name of defendant no.1 were submitted by the plaintiff as defendant no.1 was canalising agent. The defendant no.1 submitted the bills of leading and other documents for negotiations to 2nd defendant and 2nd defendant after due scrutiny realised the amount as invoiced by the defendant no.1 and they did so without any reservation or guarantee or indemnity. It is also admitted that 2nd defendant forwarded the documents to the 3rd defendants. The defendant no.3 after scrutinizing the documents realised the payment as invoiced to the defendant no.1. The defendant no.2 bank in their turn forwarded the documents to the Union Bank of the Middle East Ltd. Dubai which after some time purported to reject the same on the ground of alleged discrepancies mentioned earlier. As a result of the said objections the defendant no.2 wrongfully paid as per letters of credit to the 3rd defendant and consequently started demanding the amount from the defendant no.1. Naturally, the defendant no.1 in turn threatened the plaintiff to recover the said amount from the plaintiff. Under such circumstances, the plaintiffs executed letter of guarantee dated 6-1-1981 in favour of 1st defendant. Thus, we find that execution of letter of guarantee in favour of the defendant no.1 is not in dispute. The

main question is whether plaintiffs are justified in saying that defendant no.1 be restrained from executing the said guarantee so long as the matter referred in guarantee deed is not resolved or decided by the highest court or Tribunal.

15. In order to answer the above question, it is necessary to find out as to when guarantee dated 6-1-1981 is to be implemented or encashed. From the perusal of the said letter of guarantee, which is at Exh.G, it is very clear that the plaintiffs admitted that they received the amount of 2 bills i.e. amount of Rs.6,71,500-78 towards defendant no.1 and they agreed to make payment of Rs.7,49,925-04 together with interest to defendant no.1 on the happening of particular event. Naturally, it is necessary to see what is the stipulation embodied in the guarantee in this respect. It runs as follows :-

> "In consideration of your having at our request agreed to contest the claims and contentions made by the issuing bank arising out of the aforesaid discrepancies to the Highest Court or Tribunal in the Country where such claims and contentions are agitated, we hereby irrevocably guarantee to you the payment of the sum of Rs.7,49,925-04 together with interest, if any, that may be awarded or decreed and together

with other incidental that may be incurred purely in connection with the contest of such claims and contentions."

16. So, from this it is very clear that as per above mentioned stipulation defendant no.1 had agreed to contest the claims and contentions made by issuing bank arising out of aforesaid discrepancies, to the highest Court or Tribunal in the country and plaintiffs had agreed to make payment of Rs.7,49,925-04 if award or decree is passed against the defendant no.1 after contesting the claim and contentions made by issuing bank.

17. From the evidence on record it is very clear that as soon as the defendant no.3 started claiming amount from the defendant no.2 and in turn defendant no .2 started giving threat to defendant no.1 for recovering the amount from defendant no.1, Defendant no.1 started laying a claim against the plaintiff for the said amount. However, as per the agreement or guarantee the defendant no.1 cannot implement the letter of guarantee so long the decree or award is not passed against defendant no.1, as mentioned in the above stipulation. So, under such circumstances plaintiff was constrained to file the above suit. It is an admitted fact that plaintiffs had taken out Notice of Motion in the present

suit and on 29-9-1981 the order was passed by the Hon'ble Court as under :-

> "Pending hearing and final disposal of the suit the 1st defendants and their servants and agents are restrained from enforcing the guarantee dated 6-1-1981 or recovering any amount thereunder provided that in case the defendant nos.2 and 3 recover or seek to recover any amount from the defendant no.1 by filing legal proceedings, the 1st defendant shall be at liberty to adopt suitable legal proceedings for enforcing the said guarantee and for recovering the amount from the plaintiffs"

18. It is also not in dispute that after the passing of this order, the defendant no.2 filed a suit bearing Suit No.1553 of 1983 against the defendant no.1 and as per order passed by this Court the present suit and the Suit No.1153 of 1983 were to be heard together. However, suit no.1153 of 1983 was transferred to Debt Recovery Tribunal and ultimately decree for Rs.12,23,458-40 ps was passed against the defendant no.1. It is also not in dispute that said suit and decree were in respect of transaction in question i.e. pertaining to the matter referred to letter of guarantee. It is a case of

plaintiffs that against the said order the defendant no.1 has preferred an appeal and unless the said appeal is decided it cannot be said that contest with regard to the matter in question has been resolved or decided by the highest court or Tribunal in the country, and as such defendant no.1 is not entitled to implement the letter of guarantee. As against this, the learned Advocate for the defendant no.1 argued before me that the said appeal has been dismissed. However, cruiously enough no certified copy of the said order has been produced by defendant no.1, though specifically asked by the plaintiffs. So, under such circumstances it is very difficult to hold that the matter in controversy between the parties referred in letter of guarantee has been resolved finally by the highest court. Incidently, it must be noted that even if we assume for the sake of arguments that appeal is dismissed and the order passed by the Debt Recovery Tribunal is confirmed by the Appellate Authority still then we cannot ignore the fact that under the circumstances, it was the duty of the defendant no.1 to carry the matter further in the High Court of Judicature at Bombay and challenge the order passed by the appellate authority. So, looking to the case from any angle it is clear that defendant no.1 did not contest the matter as contemplated in the letter of guarantee and the said matter is not resolved finally by highest court or Tribunal in the country. Naturally, the defendant no.1 at this stage is not entitled to

implement the letter of guarantee, consequently plaintiff is entitled to have declaration and injunction as prayed.

19. Incidently, it must be also noted here that above mentioned two suits were to be heard together as per earlier order passed by this Court. So, when suit No.1153 of 1983 was transferred to Debt Recovery Tribunal, it was necessary for the defendant no.1, to bring it to the notice of this Court as well as to the Debt Recovery Tribunal about the earlier orders and seek necessary directions. What is more to be noted is that admittedly, the present plaintiff was not a party to the said suit. So, the defendant no.1 could have easily brought the said fact to the notice of the Court but he failed to do so. Not only that but it is alleged that defendant no.1 did not contest the said suit no.1583 of 1983 properly. The defendant no.1 had not taken proper defence and the learned Advocate for the defendant no.1 argued only point of limitation before the Tribunal which point was not raised by them in their written statement. The learned Advocate for the plaintiff therefore argued before me that defendant no.1 in collusion with defendant no.2 allowed the defendant no.2 to have order against defendant no.1. So, when the said order is obtained by collusion and fraud the defendant no.1 cannot take any further steps in pursuance of the said order. However, it must be noted that in the

present plaint the plaintiff has nowhere averred and pleaded the alleged fraud. It is true that order in Suit No.1153 of 1983 is passed during pendency of this suit and the defendant no.1 brought the said event on record by amending the written statement. However, it must be noted that if according to the plaintiff the suit order was the outcome of collusion and fraud it was very easy for him to amend the plaint but he has not done so. Naturally, no amount of evidence and argument in this behalf can be considered in the absence of pleadings.

20. It was argued on behalf of the defendant no.1 that plaintiff had not issued notice under Section 90 of Delhi Co Operative Housing Society Act and as such the suit is not maintainable. However, we find that defendant no.1 has not taken any contention in this behalf in written statement and no issue to that effect is also framed. But what is more to be noted is that defendant no.1’s witness has clearly admitted while giving reply to question no.40 in the cross examination, that by the conduct of the defendant no.1, the defendant no.1 has waived the service of the notice under Section 90 of Delhi Co Operative Societies Act. In fact it appears from the said answer that defendant wanted to communicate that defendant no.1 has waived the objection in that behalf. The learned Advocate for the defendant no.1 has also not pressed this point. So, the suit

cannot be dismissed on the ground of want of notice.

21. It was tried to be argued on behalf of the defendant no.1 that even if it is assumed that matter referred in the guarantee is not finally decided or resolved by the highest court in this country still then in view of the order passed by this Court on 29-11-1981 in Notice of Motion NO.798 of 1981 defendant no.1 is entitled to enforce the guarantee. He is in fact relying on the words "provided that in case the defendant no.2 or 3 recovered or seek to recover any amount from the defendant no.1 by filing legal notice, the 1st defendant shall be at liberty to adopt suitable legal proceedings for enforcing the said guarantee or for recovery of the amount from the plaintiffs" embodied in the said order. However, it is needless to say that this order must be read in the light of letter of guarantee in question. If so read, it would mean that defendants shall be at liberty to adopt suitable legal proceedings for enforcing the said guarantee or for recovering the amount when the matter referred in the said guarantee is finally resolved and as a result of the same the defendant nos.2 and 3 are entitled to recover the said amount from the defendant no.1. So, I do not think that the above mentioned order is of any help to the present defendant no.1 and would come in the way of plaintiffs when they say that the defendant no.1 is not entitled to enforce the guarantee because matter

referred in the guarantees is not finally resolved by the highest court or tribunal in this country.

ORDER

i. It is hereby declared that the first defendants are not entitled to enforce the guarantee dated 6-1-1981, copy of which is produced at Exhibit G. till the matter referred to therein is resolved or decided by the highest Court or tribunal in this country.

ii. The first defendants, their servants and agents are restrained from enforcing the guarantee dated 6-1-1981 given by the plaintiffs in favour of the first defendants or recovering the sum of Rs.7,49,925-4 ps till the matter is resolved or decided by the highest court or tribunal.

iii. The Defendant no.1 to pay to the plaintiffs the cost of this suit and bear their own.

iv. The suit against the defendant nos.2 and 3 stand dismissed with no order as to costs.

(S.R.SATHE, J.)